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No. 86-1593

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

SHELL OIL COMPANY,

Appellant

vs.

DEPARTMENT OF REVENUE,
STATE OF FLORIDA

Appellee

On Appeal from the
Supreme Court of Florida

Appellee's Supplemental Brief in Response to Amicus Curiae

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POINTS I AND II

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DISCUSSION

The Solicitor General's brief fully supports and confirms the decision of the Supreme Court of Florida that the State of Florida is not prohibited by the Outer Continental Shelf Lands Act, 43 U.S.C., s. 1333(a)(2)(A)(1970) from imposing a tax upon its apportioned share of income derived from the sale in the various states of the United States of oil extracted from the Outer Continental Shelf.

As to the merits of this case the

icitor General stated:

> In our view, the Florida Supreme Court--the first state supreme court to address the issue--correctly rejected Shell's preemption claim.

s the Solicitor General's view is in
l harmony with the interpretation of
State of Florida. Moreover other
eral courts have recognized that the
eral preemption is limited to taxation
activities and property beyond the
ee mile limit.

In the instant case, there is no
flict between the Outer Continental
lf Lands Act ("OCSLA") and the Florida
porate tax provisions. The purpose of
LA has been explained by the Fifth
cuit Court of Appeals in the case of
tinental Oil Company v. Federal Power
mission, 370 F.2d 57, 67 (5th Cir.
6), reh. den., January 27, 1967 which
ted:

> Congress passed the OCSLA solely to regulate the "leasing and

development...of the oil potential of the Continental Shelf." H.R. Rep. No. 413, 83d Cong., 1st Sess. 2-3 (1953), 2 U.S. Code Cong. & Ad. News, p. 2178 (1953). (e.s.)

The legislative intent behind OCSLA has also been explored by the Ninth Circuit Court of Appeals in Union Oil Company of California v. Morton, 512 F.2d 743, 747 (9th Cir. 1975) which stated that:

> Oil and gas deposits beneath the continental shelf are precious resources belonging to the entire nation. Congress, although encouraging the extraction of these resources by private companies, provided safeguards to insure that their exploitation should inure to the benefit of all.
>
> * * *
>
> Careful study of the Act confirms that Congress intended to exercise both proprietary powers of a landowner and the police powers of a legislature in regulating leases of publicly owned resources. (e.s.)

The United States v. Maine, 420 U.S. 515, 527 (1975), the United States Supreme Court ended States'

pts to offer leases on the OCS and
d that OCSLA "provided for the
ly development of offshore
rces." This result is consistent
the legislative purpose of the OCSLA
y to regulate the leasing, and
opment of the oil potential of the
Continental Oil, supra.

Other federal courts having properly
icted the application of the federal
ption, no purpose exists for this
to grant plenary review herein.

The Department reasserts that the
llant's jurisdictional statement
ged the question presented beyond
addressed by the Florida courts to
ude hypothetical elements. Further,
Appellant in its reply brief did not
ect the flaw but characterized its
per inclusions as irrelavancies.
efore, the Appellant has not
ented a proper federal question to

is Court. Standing alone an improperly esented question is grounds for smissal.[1]

Moreover, as this Court stated in eff Busby v. Electric Utilities nployees, 323 U.S. 72, 75 (1978):

> It is not the function of the certificate authorized by 28 USCA ss. 346, 8 FCA title 28, ss. 346, to require this Court to answer questions not shown to be necessary to the decision of the case. A question will not be answered if it is hypothetical....

Finally, it is the Department view hat this case presents no substantial ederal question and neither the

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[1] As stated in R. Stern, E. Gressman nd S. Shapiro, Supreme Court Practice, 298 (6th ed.) (1986):

> If there is such a jurisdictional defect (such as a decision by other than the highest state court in which decision can be had, or the existence of an adequate state ground, or a failure to present properly the federal question...the appeal will be dismissed summarily without considering the appeal papers as a petition for certiorari....)

Appellant nor the Amicus provides any viable argument to justify plenary consideration.

The Amicus Curiaes brief, in discussing the difference in transactions between divisions of a unitary corporation as contrasted to those between subsidiaries of a parent corporation, states:

> But we can imagine a nonfrivolous argument that the policies of the Outer Continental Shelf Lands Act would not be furthered by such formal distinctions....

The Department cites Sections 7701(14) and (1) from the Internal Revenue Code of 1986:

> (14)TAXPAYER-The term "taxpayer" means any person subject to any internal revenue tax.
>
> (1)PERSON-The term "person" shall be construed to mean and include an individual, a trust, estate, partnership, association, company or corporation.

Thus for federal income tax law there is no recognition of divisions of a

corporation as separate entities and none is visible in OCSLA. To bifurcate a corporation would be repugnant to these federal provisions. Moreover, for income tax purposes states are bound to respect the separateness and wholeness of each entity barring a specific provision to the contrary. Therefore, this speculation of the amicus is academic.

As stated in R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice, p. 145 (1986):

> The jurisdictional requirement relative to the raising of a substantial federal question is formalized in the various subsections of s. 1257. Thus it is necessary, in an appeal under subsections (1) and (2), that the validity of a federal treaty or statute or of a state statute have been "drawn in question."

This assertion is supported by the following statement made at p. 146 therein:

> See also White v. Johnson, 282 U.S. 367, 373 (1931), where the Court

stated that the constitutionality of a statute "is not drawn in question except in connection with its application to some person, natural or artificial," thus excluding academic questions about the statute.

The Department respectfully suggests that the decision of the Supreme Court of Florida was correct and that, therefore, the disposition of this case by dismissal is appropriate and adequate. Hicks v. Miranda, 422 U.S. 332, 343 (1975).[2]

[2] Therein this Court stated:

> We agree with appellants that the District Court was in error in holding that it could disregard the decision in Miller II. That case was an appeal from a decision by a state court upholding a state statute against federal constitutional attack. A federal constitutional issue was properly presented, it was within our appellate jurisdiction under 28 U.S.C. ss. 1257(2), and we had no discretion to refuse adjudication of the case on its merits as would have been true had the case been brought here under our certiorari jurisdiction. We are not obligated to grant the case plenary consideration, and we did not; but we were required to deal with its merits. We did so by concluding that the appeal should be dismissed because the constitutional challenge to the California statute was not a substantial one.

CONCLUSION

For the reasons stated herein and in its Motion to Dismiss or Affirm the Department asserts that there is no proper substantial federal question before this Court requiring plenary consideration and therefore the Department respectfully requests that this Court grant its Motion to Dismiss and Affirm the decision of the Supreme Court of Florida.

Respectfully submitted,

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